



OFFICE OF THE DEPUTY COMMISSIONER - LEGAL MATTERS

LEGAL BUREAU BULLETIN

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- I. SUBJECT : USE OF PHOTOGRAPHS FOR IDENTIFICATION PURPOSES
- II. QUESTION: WHAT TYPES OF PHOTOGRAPHIC IDENTIFICATION PROCEDURES MAY BE USED IN A CRIMINAL INVESTIGATION?
- III. ANSWER: THERE ARE VARIOUS TYPES OF PHOTOGRAPHIC IDENTIFICATION PROCEDURES THAT THE COURTS HAVE FOUND TO BE PERMISSIBLE, INCLUDING PHOTO ARRAYS, MUGSHOT VIEWINGS AND SET BOOK VIEWINGS.

IV. DISCUSSION:

A. WHY IS THIS BULLETIN BEING ISSUED? – IMPROPER PHOTOGRAPHIC IDENTIFICATIONS CAN LEAD TO WRONGFUL CONVICTIONS

Recent advances in DNA technology have resulted in an increase in the exoneration of individuals who were wrongfully convicted of crimes. An outgrowth of that development has been a careful study of the reasons why these types of convictions may have occurred. In some cases the evidence that helped lead to a wrongful conviction was a mistaken identification by a witness to or a victim of a crime. In most cases, these identifications were not intentionally false. Rather, the witness was simply mistaken in the belief that the person that they have identified was, in fact, the perpetrator of the crime.

In order to help prevent wrongful convictions, the Department has undertaken a series of reforms designed to improve the quality and reliability of photographic identifications. These reforms include a complete overhaul and re-design of the Photo Manager System and the adoption of “best practices” developed by the Department in conjunction with the New York State District Attorneys Association and other New York State law enforcement and criminal justice agencies.

The purpose of this bulletin is to review the basic rules for the use of photographs in criminal investigations and to remind investigators of the significant adverse consequences that can occur from truthful, but incorrect, witness identifications

B. INTRODUCTION

For many years the courts have recognized the important role of photographic identification in law enforcement. However, courts have also recognized that the improper use of photographs for identification purposes can sometimes cause a witness to make a mistake in identifying a suspect. It is critically important therefore that police officers use proper techniques in conducting photographic identifications so that when an identification is made it is made from the memory of the witness and not some other factor.

As a general rule and absent some compelling circumstances, when a suspect is in custody, a photographic identification should not be used. A lineup should be conducted instead.

C. TYPES OF PHOTO IDENTIFICATIONS

There are three basic types of photo identifications: (1) Photo Array, (2) Mug Shot Viewing and (3) Set Book Viewing.

Photo Array – Used when there is a known suspect, the Photo Array consists of the display of six or more photographs, one of which is the suspect.

Mug Shot Viewing – Used when the suspect is not known, the Mug Shot Viewing consists of the display of multiple photographs of individuals with the same physical characteristics as the perpetrator, as described by the victim or a witness to a crime.

Set Book Viewing – A Set Book is a collection of six or more photographs of persons who may engage in criminal activity and are: (a) associated with each other (e.g., gang, crew, school, residence); or, (b) not associated with each other but who engage in similar criminal activity (e.g., robbery, burglary, larceny-pickpocket, sex offender-transit system). A Set Book Viewing is used when the suspect is not known, but there is some reason to believe that a photograph of a possible suspect is in a Set Book.

D. SUGGESTIVENESS IN PHOTOGRAPHIC IDENTIFICATIONS

Although courts recognize the utility of photographic identifications in criminal investigations, they also recognize even a properly conducted identification procedure (prompt on-the-scene show up, photo identifications or lineup) will invariably be somewhat suggestive. That is, the witness will recognize that the police usually have an idea of who the suspect is or that individuals who are depicted in photo identifications have probably committed crimes in the past.

However, the key to the admissibility or utility of an identification procedure in a criminal investigation is that the procedure utilized was not “unduly or unnecessarily” suggestive.

Under New York law an identification procedure is unduly or unnecessarily suggestive if it creates a substantial likelihood that the defendant would be singled out for identification. In other words, if there is something about the manner in which the procedure was conducted that influences a witness to focus upon or which draws attention to the defendant, there is a significant risk that any identification made will be based upon something other than the witness' memory. Courts will suppress identifications made under these circumstances, and in some instances, preclude the witness from testifying about the identification at all.

Photographic identifications are not admissible as evidence in a criminal prosecution in New York State courts. However, they can be used to establish probable cause for arrest and

provide a basis for the conduct of a corporeal lineup. However, if the photographic identification that precedes the lineup is not conducted in accordance with Department procedures that are designed to avoid suggestiveness, the lineup identification may be tainted and the identification evidence suppressed.

Listed below are some examples of photographic identifications that courts have found to be unduly suggestive:

- Photo array which failed to conceal defendant's neck tattoo.
- Defendant depicted in photo array wearing hooded sweatshirt described by victim.
- Only defendant's photo depicted a height chart suggesting prior police involvement.
- Only one of six photos resembled defendant in age, weight and face.
- Three individuals in single photograph, suspect circled in red.

Chief of Detectives Memo No. 6/2013(Mug Shot Photo Identification Procedure) and Chief of Detectives Memo No. 7/2013 (Photo Array Identification Procedure) contain detailed guidelines for properly conducting these types of photographic identifications. These guidelines are designed to prevent an identification procedure from being unduly or unnecessarily suggestive and must be carefully followed. Whether the photographic identification involves a photo array, mug shot viewing or the use of a "Set Book," similar rules on avoiding suggestiveness apply. Listed below are some of the important considerations:

- All photographs used in the identification must be similar in quality, size, style and appearance. Arrest photographs should not be mixed with DMV photographs or social media photographs. Black and white photographs should not be shown with color photographs.
- The individuals depicted in the photographs should be similar in appearance to each other based upon race and sex, facial hair and other identifying features.
- If a suspect has any unusual or unique characteristic that is depicted in the photograph, or that was described by a witness, that characteristic must either appear in all the other photographs used or it must be removed from the suspect's photograph. For example, if the suspect has a scar or other marking on his face or neck that is visible in the photograph, all the other photographs must have similar markings or the marking must be removed from the suspect's photograph.
- The investigator conducting the photographic identification must avoid any suggestion that the suspect is, in fact, depicted in one of the photographs.

When creating a photo array or mug shot viewing utilizing the Photo Manager System, the software will help to select photographs that comport with the guidelines discussed above. However, when using "Set Books" which have not been created using the Photo Manager System or ECMS, it is especially important to carefully review all photographs in the Set Book to ensure that the photographs to be viewed by the witness are appropriate. Set books which contain photographs that are not consistent in quality, style, size and color should not be utilized

for identification purposes. Similarly, set books which contain photographs depicting information other than photographic images, i.e., pedigree information, arrest histories, graffiti tags, should not be shown to witnesses for the purpose of identification.

E. CONCLUSION

The concepts discussed in this bulletin are not new. They have existed in NYPD procedures for many years. They are being re-emphasized here, not only as a refresher in the appropriate techniques to be used, but also to emphasize the importance of avoiding doing anything to influence a witness' actions in viewing photographs for identification purposes. Such influences can occur even inadvertently if these procedures are not carefully followed. A conviction based on a mistaken identification benefits no one and injures not only the person wrongfully convicted, but public confidence in the criminal justice system.

NOTE: The rules described above apply only to photographic viewings conducted for identification purposes, i.e., a crime has been committed and the suspect and victim or witness is not known to each other. When the suspect and the victim are known to each other, such as in a domestic violence assault, a photographic viewing for identification purposes is not required. Any photographic viewing done in this circumstance is for the purpose of **confirmation**, i.e., (1) determining that the person that has been arrested is the person who has already been identified by the victim or witness, or (2) if the suspect is not yet arrested, that the correct person is taken into custody when they are found. Photographs may also be shown for **intelligence-gathering** purposes without a concern for suggestiveness. For example, if you are attempting to determine whether an individual is a member of a gang or crew, you may show that person's photograph to an informant for the purpose of determining gang or crew affiliation.